# Riparian Rights and Public Foreshore Use in the Administration of Aquatic Crown Land

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# 1. Introduction

*In British Columbia the Ministry of Crown Lands administers aquatic Crown lands. This paper reviews the riparian rights of property owners and provides guidelines on how to protect these rights and the privilege of public access, while making such land available for other uses.*

Aquatic lands are the foreshore and beds of streams, rivers, lakes and bounded coastal water, such as Georgia Straight, the Strait of Juan de Fuca and inlets. In British Columbia, the Crown retains the title to lands below the upland natural boundary, except where they were Crown-granted long ago.

The Ministry of Crown Lands administers these aquatic lands and provides for various commercial, industrial, conservational, and recreational uses. In doing so, it respects the common law rights of waterfront property owners and recognizes the importance of public access to and passage along the foreshore.

Owners of property located adjacent to a body of water have traditionally enjoyed certain riparian (stream or river banks) and littoral (sea or lake-shore) rights. For simplicity, the term riparian is used for all rights pertaining to the shore or bank of a body of water.

Riparian rights, which run with an upland property, include access to and from the water, protection of the property from erosion, ownership of naturally accreted material, and use of water of undiminished flow and quality for domestic purposes. Some, but not all, of these rights are still recognized in British Columbia today.

This paper reviews these rights and demonstrates the ways in which they affect and, in turn, are affected by the administration of Crown land.

The guidelines provided explain how the Ministry can protect riparian rights in carrying out its administrative function and how it can assert the Crown's right to eroded land. The paper also describes the mechanisms by which the Crown can retain or acquire riparian rights.

While much of the information in the paper is based on case law concerning riparian rights, the conclusions and administrative guidelines outlined are not legal opinions on either the nature or the extent of such rights.

# 2. Riparian Rights and Public Foreshore Use: Historical and Legal Foundations

## The Origin of Riparian Rights

For centuries it has been recognized that water bodies and watercourses are essential for marine commerce. Non-navigable streams have also received special attention because of their value in supplying potable water for domestic use and for irrigation. Over time, certain rights have been established for these uses.

Access to and from waterfront property, maintenance of the quality and quantity of surface water flow, and the ownership of naturally and imperceptibly accreted material are not rights granted by statute. Instead, they developed as common law rights, and the courts have defined their nature and extent in numerous legal proceedings.

Some of the original riparian rights have been specifically or incidentally eliminated by statute. Others remain entrenched as common law rights incidental to ownership of riparian property and "run with the land." They are not associated with the title of the land; they arise by virtue of its ownership, and they do not follow the owner who moves to another property.

## The Rights of the Crown and Public Use of and Access to Aquatic Crown Land

The *Land Act* and *Land Title Act* provide the authority under which the Ministry of Crown Lands administers aquatic Crown land.

The Ministry recognizes and respects the riparian rights of waterfront property owners. But in special cases it may assert its own right to protect the public interest or to make aquatic Crown land available for commercial, industrial, conservational or recreational purposes.

The Crown recognizes the importance of providing for public use of aquatic Crown lands and public access to and along the foreshore, but these are not public rights, and they cannot be guaranteed in all cases.

The public does enjoy a privilege or bare licence to use the foreshore and other aquatic lands held by the Crown. The only rights that exist, however, are the right to land boats and to embark from the foreshore in cases of emergency, and the rights of navigation, anchoring, mooring, and fishing over those lands covered by water.

Navigation is under federal rather than provincial control. The Canadian Coast Guard exercises this management responsibility under the authority of the federal *Navigable Waters Protection Act*.

Anyone who wishes to build structures in navigable waters must obtain approval from the federal government. If the building causes special damage, however, this approval does not guarantee protection from legal action. This damage usually involves interference with a commercial operation.

# 3. The Nature and Extent of Riparian Rights in British Columbia and in Other Jurisdictions

Riparian rights involve the relationship between water and the land beside which or over which it rests or flows. In common law, riparian rights generally include the following:

- protection from erosion by an owner
- quality and quantity of surface water flow
- ownership of natually accreted material
- access to and from the water

The question of how far property rights extend out into a river or other body of water is also often included in the discussions of riparian rights although, strictly speaking, it is the ownership of the bed of such water bodies that is involved, not rights.

Similarly, constructing facilities on the foreshore below the natural boundary to enhance access to and from the water is also often thought of as a riparian right. In Canada, such construction generally requires the consent of the Crown and is not a "right" of the upland owner.

However, because these two subjects arise so often, they have been included in this analysis.

## Protection of Land

British Columbia recognizes the right of shoreland property owners to protect their land from erosion or flooding, by building embankments, dykes, or other protective improvements. This right extends only to the natural boundary of the property. Owners therefore have the right to install protective structures on their own land; but they require the consent of the Crown to extend such structures below the natural boundary.

## Quality and Quantity of Surface Water Flow

The original and fundamental riparian right was the right to use and divert water in a stream or river for domestic purposes.

Since many people used a common stream traversing their lands for domestic supply and irrigation, their equal right to water of undiminished flow and quality became a basic riparian right.

This right was effectively abrogated in British Columbia with the passage of the *Water Act*. Even as early as 1884, these rights were limited when the *Land Act* made provision for the control and recording of all water used or appropriated from streams and rivers. The water-licencing system now in place still retains concern for the quality of water enjoyed by downstream users, but users are limited in the amount of water they may take for their own use and cannot divert water without consent of the Crown.

## Natural Accretion and Erosion

Land abutting any body of water is subject to certain forces of erosion and deposition (accretion). The ownership of accreted land has long been a subject of legal debate.

According to the generally accepted principle in British Columbia, the waterfront property owner does not own land created by a sudden deposit of material by flood or an artificial interference in natural processes, or by an addition to the upland that occurs as a result of a natural uplifting of a lake or stream bed.

However, the waterfront property owner does own land that has accreted to the upland through gradual and imperceptible natural deposition. This rule also applies, in some cases, where the material has gradually and imperceptibly accreted as a result of a structure placed on another property by another party.

Changes to the natural boundary of a property that result from accretion can be determined in accordance with the *Land Title Act* and, in the event of disagreement, by the *Land Title Inquiry Act*.

This situation can also operate in reverse. When the upland is eroded, the property lost becomes part of the foreshore or bed of the adjacent water body. The Crown then owns the land below the natural boundary.

Where erosion or accretion has occurred, the title to the upland may not reflect the actual extent of ownership.

## Access: Ingress and Egress

The final major riparian right associated with waterfront property is the right to unimpeded access to and from that property to deep water for the purposes of navigation. This right exists separate and apart from the public right of navigation, and the right of access applies to non-navigable bodies of water as well.

This right of access to and from the water applies to every point along the water frontage, including every part of the foreshore in front of the upland property. As a result, improvements cannot be constructed on a waterfront property if they interfere with access. Whether or not an obstruction constitutes interference must be determined in each individual case. The types of obstruction likely to constitute interference are discussed in Section 4.

The right of access is still recognized as a riparian right in British Columbia. It is probably the most important of the remaining riparian rights acknowledged in the Ministry's administration of land.

## Extension of Property Rights

The extent and control or "sphere of influence" of property rights has become an important issue in British Columbia as a direct consequence of historical claims to property rights over the beds of water bodies located adjacent to privately owned upland. Given that the riparian right of access extends along the entire foreshore in front of an upland property, the question at issue was how far out into the water that right extended.

In the case of streams bounded on opposite sides by private land, the "sphere of influence" was considered to extend to a point equidistant from each bank to the centre or middle of the watercourse. This principle — *ad medium filum aquae* (literally, "to the middle thread of the stream") — could only be applied practically in the case of narrow streams, or small bays where the distance between shores was relatively short. It was considered impractical to extend the sphere of influence of such rights to the centre line of any water bodies other than very small lakes.

In Kennedy v. Husband, (1923) 1 D.L.R. 1069 (B.C. Co. Ct.) the court confirmed that the principle of *ad medium filum aquae* does not apply to large navigable bodies of water. In fact, it is not clear that it has ever applied to navigable waters in general.

This particular right -- which is more a "property" right than a riparian right -- has been largely abrogated in British Columbia as a result of an amendment to s. 52(1) of the *Land Act*. This amendment precludes private rights of ownership or control over the beds of streams, lakes, rivers, and other water bodies in the province.

Similarly, s. 108(2) of the *Land Title Act* provides that, when a subdivision plan is filed in the Land Title Office, any previous title to adjacent submerged land an upland owner may have held is automatically forfeited to the Crown. The shoreward extent of the property ownership thus ends at the natural boundary.

## Construction of Facilities for Access

Waterfront property has always had strategic importance for the conduct of marine commerce. As a consequence, the traditional right of access to deep water for navigation has often been interpreted to include the right to construct facilities on the foreshore to provide such access.

Case law suggests that riparian owners have a limited right to construct floating wharves or docks that do not interfere with the public right of navigation and that are only affixed to their own upland property (Booth v. Ratte (1890), 14 A.C. 612 P.C.)). In fact, however, this right does not extend to facilities that are anchored or in any way affixed to the foreshore or bed of the adjacent water body.

Because title to most of the foreshore and beds of water bodies in British Columbia is vested in the Crown, in practical terms, owners require the express consent of the Crown to construct most facilities.

## Riparian Rights In Other Jurisdictions

Most of the riparian rights reviewed in Section 2 are recognized in other jurisdictions. The three riparian rights still observed in British Columbia are all recognized in England under common law. The principles covering accretion and erosion, access to water, and protection from erosion of property are similar to those recognized here, as are the legal and jurisdictional arrangements for guaranteeing those rights.

In the United States, the right to accreted land is essentially the same as it is in Canada and in England. Similar principles are used in these jurisdictions to differentiate gradual and imperceptible accretion or erosion from sudden or artificial processes.

Because such a large percentage of the foreshore is privately owned in many states, property owners have greater rights to protect their land and to build facilities for access to deep water and public rights are more restricted.

In general, the position adopted by British Columbia with respect to the three types of riparian rights it continues to recognize is consistent with that of other jurisdictions -- both in the way in which these rights are defined and the legal and institutional arrangements used to ensure their protection.

## Summary

Of the fundamental riparian rights and related property rights mentioned here, three have either been abrogated by statute in British Columbia or have, in fact, never existed as rights of waterfront property owners. They are:

- the principle of *ad medium filum aquae*
- the right to water flow of undiminished quality and quantity
- the right to construct facilities on the foreshore to provide for access to deep water.

Of the remaining three, the right to protect waterfront property from erosion is relatively well established. The limits of that right are defined by the boundaries of the upland property: the natural boundary as it exists from moment to moment is the line past which protective works are not to be erected without consent of the Crown.

In order to have accreted land included in the title, the owner must demonstrate that accretion occurred slowly and imperceptibly over time. This fact is sometimes difficult to establish.

The right of access has been specifically defined with respect to the waterfront property. Ingress and egress must be possible from every point along the water frontage over every part of the foreshore.

In administering and protecting these rights, there are three areas where difficulties may arise for the Ministry:

- allocating foreshore and nearshore tenures while avoiding interference with the riparian right of access
- claiming ownership of eroded lands

- retaining riparian rights for the Crown through the mechanism of a statutory right of way over the riparian rights of a waterfront property.

Guidelines for dealing with these issues are discussed in Section 5.

# 4. The Relationship Between Riparian Rights, Public Foreshore Use, And Land Act Tenure Administration

Under its mandate to administer aquatic Crown land, the Ministry of Crown Lands employs various mechanisms to provide for public foreshore access, where feasible, and to protect the riparian rights of waterfront property owners. It also facilitates other uses of the foreshore and nearshore by providing various types of tenure granted under the *Land Act* and by implementing the specific commercial, industrial and recreational land use policies developed by the Ministry.

In granting tenure to aquatic land, the Crown makes every effort to facilitate public access to and along the foreshore. However, there are instances where it is not possible to accord this privilege.

Most tenures created over the foreshore or nearshore have specific limits on their nature and duration. The various types of tenure are described here in general terms.

In almost all cases, tenures granted by the Ministry over foreshore or nearshore areas are separate and distinct from the ownership of the upland property. The fact that a waterfront property owner has obtained tenures over the adjacent foreshore **does not** mean that those tenures are automatically assigned to future purchasers.

Confusion sometimes arises when prospective buyers of waterfront property are mistakenly led to believe that Ministry tenures held by the owner "go with the property." The Ministry must give its permission to transfer tenure from one party to another. This permission is not withheld unreasonably, however. In addition, should the former owners retain the leasehold of the foreshore after selling the property, they may have the right to restrain the new owner from trespassing on those leases. Of course, the leaseholder will also have to respect the riparian rights of the new upland owner, including the right of access to and from the property.

Prospective buyers should check with the Ministry to ensure that any development on the foreshore or nearshore adjacent to the property is legitimate. Also, such purchasers should not assume that any tenures in front of that property will be automatically assigned to them. Assignment may be possible, and it will be considered upon application to the Ministry.

## The Nature and General Provisions of Tenure Issued Under the Land Act

### Temporary Permit

A temporary permit to occupy aquatic Crown land may be issued to allow investigation or to authorize temporary short-term use. Generally, temporary permits are issued for commercial or industrial foreshore operations.

Investigative uses may be authorized for periods up to one year, while other temporary uses may be authorized for up to six months.

This type of permit does not necessarily include the right to construct facilities or improvements on the land.

### Licence of Occupation

A licence of occupation authorizes the holder to occupy Crown land for a given purpose for a period usually not exceeding ten years. The licence is contractual and non-exclusive. It conveys a mere "right to occupy," and not an "interest" in the land. As a result, major improvements -- including structures, buildings, and modifications to the land -- are not likely to be permitted under this form of tenure.

To protect the public interest, the Ministry often issues a licence of occupation where the tenure-holder does not require the long-term security of tenure. Because it does not convey an interest in the land, a licence of occupation does not give the holder a right to restrict public access across the licence area.

### Lease

Lease tenure conveys a limited interest in the land and also allows for the construction of improvements on the land or for modifications to it. Often the applicant will have to provide a management or development plan to ensure appropriate and efficient use of a lease. The standard term for foreshore leases is thirty years.

As with other forms of tenure, a lease may be issued for a particular upland area, for a part of the foreshore, or for submerged land. The latter is usually physically distinct from and not abutting the mean ordinary low water mark.

The Ministry uses leases where the land is to be developed or improved over time and/or where the applicant requires a measure of security of tenure to obtain financing or liability insurance before undertaking development.

The long-term nature of such development makes lease tenure the most likely type to be involved in an infringement of the riparian rights of adjacent waterfront property owners.

Since leaseholders have an interest in the land, they technically acquire a right to restrict public access to and across the tenure area by posting or other notice. Ministry staff will often encourage leaseholders to provide public access where it is clearly not detrimental to the interests of the leaseholder.

### Statutory Right of Way Over the Riparian Rights of Waterfront Property

Under s. 214 of the *Land Title Act*, the Crown may acquire a statutory right of way that takes precedence over the riparian rights of a waterfront parcel, thus securing the riparian rights associated with that parcel to the Crown. It can do so either by gaining the consent of the incumbent waterfront owner or, where the Crown still holds the waterfront parcel, by registering the statutory right of way against the parcel before it is sold or leased. The circumstances where the Crown may decide to seek a statutory right of way on its own behalf are discussed in Section 5.

### Crown Grant or Fee Simple Disposition

In instances where Crown upland will be converted to private ownership, the Crown does not dispose of foreshore or the beds of adjacent waterbodies by grant or by fee simple. Maintaining such lands as a public trust is considered to be of prime importance.

Even long-term uses of the foreshore are almost always accommodated by lease tenure. As a result, permanent dispositions of Crown land are seldom involved in riparian rights conflicts.

## Riparian Rights and *Land Act* Tenure Administration in British Columbia

In granting foreshore and submerged land tenure and ensuring public access to and along the foreshore, the Ministry takes the riparian rights of waterfront owners into account in the following general ways.

### Protection of Land from Erosion

The Ministry does not always authorize the construction of improvements or the placing of fill for protection of waterfront property from erosion or flooding. If such improvements or fill would impinge on the right of access from an adjacent riparian property or on the public right of navigation, or if they unduly affect public passage along the foreshore, authorization may be denied.

Where such construction cannot be confined to an area above the natural boundary of the waterfront property, consent must be sought from any other waterfront property owner whose right of access may be infringed upon, before alterations to the foreshore are approved.

In general, when the Ministry approves improvements or fill below the natural boundary, it will ensure that public passage along the foreshore is maintained.

Since the right to protect waterfront property is generally exercised above its natural boundary, this right does not usually conflict with the Ministry's administration of land. However, where such improvements or fill have been located on the foreshore without the consent of the Ministry (that is, in trespass), decisions about legalizing them will not be made until the riparian rights of any adjacent waterfront property owners and the public interest are considered.

Owners of waterfront property who have suffered some degree of erosion should check with the Ministry before making improvements. If the land on which they wish to place fill or build protective structures is owned by the Crown, consent will be required.

### Accretion and Erosion

#### *Accretion*

Where material gradually and imperceptibly accretes to a waterfront property and extends its natural boundary towards the water, common law holds that the property owner owns the accreted land. Because it is difficult to establish whether the land is in fact an accretion, conflicts over the ownership of purportedly accreted land often have to be resolved on a case by case basis. The provisions of the *Land Title Act* and, in rare cases, the *Land Title Inquiry Act* guide the resolution.

Where the accretion is valid and the waterfront property has thus been altered, the Ministry makes the necessary adjustments in its land administration decisions regarding the adjacent foreshore.

***Erosion***

A more problematic question arises when erosion moves the natural boundary of a waterfront property inland.

In the case of properties covered by a subdivision plan filed in the Land Title office, section 108(2) of the *Land Title Act* provides that the owner's title is extinguished over land that was covered by water at the time of subdivision (R. in Right of British Columbia v. Ogopogo Investment (1980), 23 B.C.L.R. 43 (B.C.S.C.)). The Ministry takes the view that title would be extinguished even if the erosion had not occurred gradually and imperceptibly but, rather, by avulsion.

This view is based on an interpretation of s. 108(2) of the *Land Title Act*, but at present there is no case law in British Columbia on this point.

Where the property has not yet been covered by a subdivision plan, the common law and the Torrens land title system appear to be at odds. The Ministry holds that the common law concerning erosion would apply in such circumstances: that is, where an erosion has occurred through gradual and imperceptible processes, the Crown can lay claim to the land located below the newly-receded natural boundary.

The Crown may not be able to raise title to such land in the land title system until a court declaration has been obtained. In the Ministry's view, however, it may proceed to make land administration decisions in the interim based on the common law doctrine that eroded land is owned by the Crown.

The Ministry may have to act in the public interest on instances of erosion of property. Should a waterfront property owner decide at a later date to construct improvements or place fill at the site of the former natural boundary, the alterations might well impede public passage along the foreshore or block it altogether.

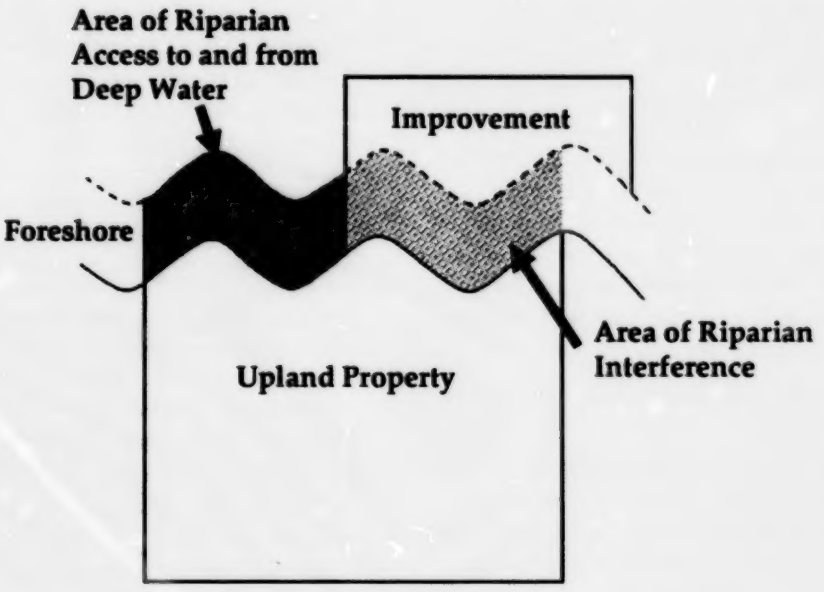


*Figure 1: Tenure with Improvements Located Adjacent to the Foreshore in Front of a Riparian Owner*

## Access: Ingress and Egress

The final remaining riparian right -- unimpeded access to and from every point along the foreshore adjacent to a waterfront property -- has a significant impact on the Ministry's administration of land.

### Tenure Abutting or Covering the Foreshore

Figure 1 illustrates how the riparian right of access can become a problem. This diagram shows an upland property and the adjacent foreshore and nearshore areas.

The improvement that abuts the mean ordinary low water mark in Figure 1 would undoubtedly constitute an obstruction and an actionable interference with the owner's right of access. In this case, the property owner would not have access to deep water for the purposes of navigation from every point along the foreshore in front of the property.

It is not enough that the property owner could get to deep water from every point along the natural boundary of his property (that is, from the mean ordinary high water mark). The improvement would still constitute an infringement of the riparian right of access.

In Attorney General of the Straits Settlement v. Wemyss (1888), 13 A.C. 192 (P.C.), it was held that the riparian right of access extends "from every part of the frontage, over every part of the foreshore." Thus, if the improvement only covered part of the foreshore, it

would make no difference. The improvement would still constitute an interference.

Therefore, where a foreshore lease abuts the mean ordinary low water mark or covers part of the foreshore and also extends in front of privately owned waterfront property, it is likely that any improvements placed on that lease will constitute an interference with the owner's right of access.

### Tenure Located Nearshore or Offshore

Baldwin v. Chaplin (1915), 21 D.L.R. 846 (Ont. S.C.) indicates that whether an interference with the riparian right of access has occurred will always be a question of fact. Thus, the circumstances and resolutions will differ from case to case.

In cases where a waterlot lease does not abut the mean ordinary low water mark or cover part of the foreshore but still extends in front of privately owned waterfront property, the situation is more problematic.

To make sure there is no infringement on an upland owner's right of access, the Ministry takes a conservative approach: Foreshore leases in front of private waterfront are not normally approved. This policy has been based on the finding in Redwood Park Motel Limited v. British Columbia Forest Products Limited (1953), 8 W.W.R. (NS) 241 B.C.S.C). The decision in this case held that the Crown has no power to authorize a lessee to obstruct navigation or to unduly interfere with a riparian proprietor's right of access.

In Figure 2, an offshore lease extends in front of a privately owned waterfront property. Any improvement on that lease (such as a log boom) would interfere with the upland owner's ability to travel directly to the point marked "X" on the diagram. However, it would not prevent the upland owner from having access to deep water from every point along the foreshore (indicated by the shaded area on the diagram).

While this type of improvement might not constitute an interference with the waterfront property owner's right of access, it could be actionable as an interference with their public right of navigation. The decision in Redwood Park (p. 242) affirmed that the Crown has no power to authorize an interference with navigation:

*The right of navigation in tidal waters is a right of way thereover for all the public for all purposes of navigation, trade and intercourse. It is a right given by the common law, and is paramount to any right that the Crown or a subject may have in tidal waters, except where such rights are created or allowed by an Act of Parliament. Consequently every grant by the Crown in relation to tidal waters must be construed as being subject to the public rights of navigation. It is not right of property; it is merely the right to pass and to repass and to remain for a reasonable time.*

When the Ministry locates waterlot tenures, it must ensure that any improvements will not constitute an interference with the public right of navigation. According to common law, the waterfront property owner's right of navigation is equivalent to that enjoyed by any other member of the public. The Ministry cooperates with the provisions of the federal *Navigable Waters Protection Act* in locating

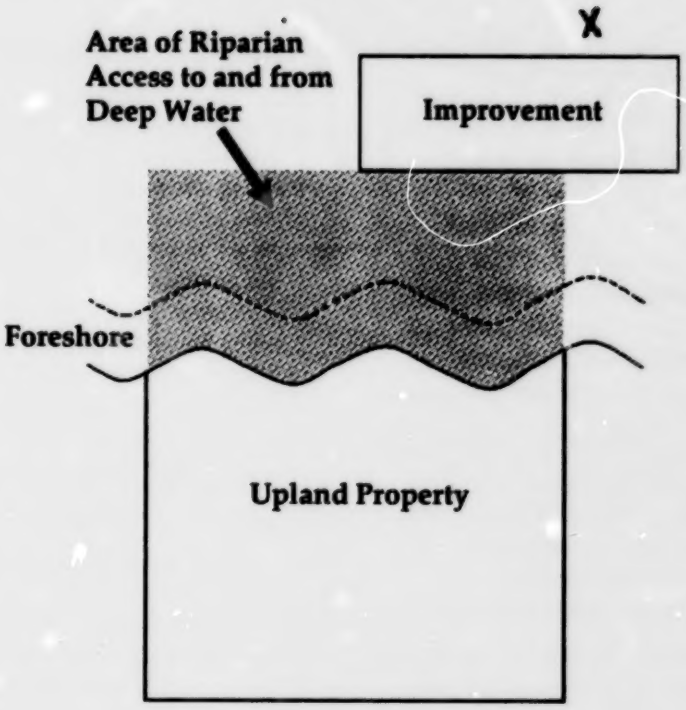


*Figure 2: Tenure with Improvements Located Nearshore in Front of a Riparian Owner*

foreshore and waterlot leases and licences.

Provided that an improvement, such as the one shown in Figure 2, is far enough away from the mean ordinary low water mark to allow the adjacent waterfront property owner access to deep water from every point along the foreshore in front of the property, and provided that the improvement does not hinder the public right of navigation, the improvement should not infringe on the waterfront property owner's rights.

The Baldwin decision was appealed to the Ontario Supreme Court Appellate Division in 1915. In dismissing the appeal, Justice J. Hodgins noted that:

*. . . interference with the right of navigation which only renders access more difficult, but not impossible, is an interference with a public and not a private right and special damage must be proved by the riparian owner who complains of such interference.*

While no case law precedent establishes how far offshore such an improvement would have to be located to ensure that it does not interfere with the property owner's rights of access or navigation, the Ministry has developed a guideline based on the decision of Justice MacFarlane in Nicholson v. Moran, (1950) 1 W.W.R. 118 (B.C.S.C.). This guideline is described in Section 5.

In questions of navigation, the federal Minister of Justice and provincial Attorney General are the only authorities able to take action where the breach of navigation affects the public but does not affect particular individuals. Individuals can only take action in situations where they can show special damage affects them. This damage usually involves interference with a commercial operation.

## Summary

The riparian right of access and the right to navigation enjoyed by riparian owners, in common with the public, have the greatest impact on the Ministry's administration of land.

The riparian right of access requires that the waterfront property owner be able to get to and from deep water in a navigable craft of reasonable size from every point along the waterfront property and from every point along the foreshore directly in front of it.

Any obstruction that makes it impossible to reach every point along the adjacent foreshore from deep water is likely to be actionable. The obstruction is an infringement of the waterfront property owner's riparian right of access.

An obstruction located in front of privately owned waterfront property, which does not infringe upon the riparian right of access, may nonetheless constitute an impediment to the owner's public right of navigation. However, the owner must be able to show special damage or the owner will only receive the same consideration as the general public.

# 5. Administrative Guidelines

The following guidelines are designed to help the Ministry recognize and protect the rights of riparian property owners, as well as the interests of the general public in administering aquatic Crown land. These guidelines are general in nature. More specific procedural policies covering these matters are set out in the Ministry's Land Administration Manual.

## Accretion and Change of the Natural Boundary in Favour of the Waterfront Owner

Where a riparian owner believes that there has been a change in the natural boundary of the property over a period of time, resulting either from accretion or from a receding of the level of the adjacent water body, the owner can apply to the Ministry to determine whether this new land can be included in the title. The Surveyor General, under delegated authority from the Minister, makes this decision according to the provisions of ss. 94 and 118 of the *Land Title Act*.

The factors used to decide whether the land has been accreted include:

- Has the land formed gradually and imperceptibly?
- Has the land grown outward from the bank, or has it emerged from the bed of the water body?
- Is most of the land in question now dry?
- Does the land now lie above the natural boundary?
- What is the character of the soil and vegetation now found on the land? (this determination provides an indication of accretion only; it is not necessarily definitive).

Ministry regional offices can supply a list of the specific information required in applications submitted to change the extent of title to recognize an accretion.

If the accretion of land is found to be valid, there is no charge for the land and the owner's title will be amended accordingly.

## Erosion and Acquisition of Land by the Crown in the Public Interest

On occasion, the Ministry will find it necessary to take formal notice of the fact that a waterfront property owner's natural boundary has moved inland as a result of gradual and imperceptible erosion.

To protect the interests of the public (particularly in attempting to maintain the privilege of public foreshore access and use) and also to provide for other uses of aquatic Crown land, the Ministry may lay claim to eroded land.

According to common law, land that has been gradually encroached upon by water ceases to belong to the riparian owner and becomes the property of the owner of the bed of the water body (Southern Theosophy v. South Australia (1982), 1 All E.R. 283 and Bruce v. Johnson (1953), O.W.N. 724 (Ont. Co.Ct.)). The requirement for **gradual** encroachment is specified in

A.G.B.C. v. Nielson (1956), 5 D.L.R. (2d) 449 (S.C.C.).

Section 108(2) of the *Land Title Act*, provides that in cases where the erosion has occurred before a subdivision plan covering the property in question was filed in the Land Title Office, the waterfront property owner's title to that eroded material is automatically extinguished. In the Ministry's view, this is also the case in "avulsion" (where the process has occurred suddenly) provided that the area is covered by water at the time of subdivision.

Where no subdivision plan has been filed, the Ministry believes that the common law doctrine of accretion and erosion still applies. Accordingly, in the Ministry's view, such eroded land belongs to the Crown even before the title of the waterfront property is amended to show the new water boundary.

Staff of the Ministry's regional offices may monitor areas of shoreline that are particularly subject to forces of erosion. Where erosion has clearly occurred over time and where any action by a waterfront property owner to reclaim the eroded area to the former property boundary by improvements or fill would have a negative impact on public use of the foreshore or on other uses of the aquatic Crown land, the Ministry may assert its claim to that land. It would then seek the necessary adjustments to the title of the property.

## Retaining the Riparian Rights of a Waterfront Property for the Crown

The Ministry is aware that retaining the riparian rights of waterfront property in the name of the Crown under s. 214 of the *Land Title Act* is sometimes in the public interest. In such, cases the Ministry may seek the permission of an existing waterfront property owner to allow statutory right of way on behalf of the Crown. In cases where the upland is still Crown land, the Ministry may choose to establish such a right of way before allocating the parcel.

The Ministry may use this mechanism to gain or retain riparian rights in the name of the Crown where it is clear that planned foreshore uses may be affected (over the long term) by changes in the ownership of the adjacent upland and corresponding changes in consent with respect to riparian access.

The Ministry uses this mechanism selectively; it is not designed to diminish the legitimate riparian rights of the majority of waterfront property owners in the province.

## Protecting the Right of Access in the Case of Foreshore Tenures Involving Improvements

Unless the Crown has secured the riparian rights of the adjacent waterfront property, the Ministry will not allow foreshore tenures (on which improvements may be added) in front of privately owned upland without the written consent of the owner.

Such consent does not abrogate the riparian rights that run with the land and is not binding on subsequent owners of the property. Where the upland is held in some form of tenure but not in fee simple, the Ministry attempts to ensure that the term of tenure issued on adjacent aquatic Crown land is concurrent with the term of the upland tenure.

If the Ministry has established a statutory right of way in the name of the Crown, thus securing the riparian rights, no consent is required from subsequent upland owners.

## Protecting the Right of Access in the Case of Nearshore and Offshore Tenures Involving Improvements

No firm guidelines exist for determining how far out into the water an improvement must be located so that it does not interfere with either the waterfront property owner's right of access or the public right of navigation.

In order to "err on the side of caution", the Ministry follows the remarks of Justice J. MacFarlane in Nicholson v. Moran, (1950), 1 W.W.R. 118 (B.C.S.C.) as a policy guideline. In discussing interference and reasonable access, Justice MacFarlane used a boat 30 to 40 feet long with a draught of from 3.5 to 5 feet as a standard to determine reasonable access. Such a boat is "a boat of reasonable size to use in safety in the adjacent waters, being the waters of the Gulf Islands, on practically all occasions."

The Ministry recognizes that interference with access and navigation has to be assessed differently in every situation because of variables such as the shape of the coastline, depth of water, tides, and so forth. However, Ministry staff will generally attempt to locate nearshore and offshore tenures so that at lowest tide a 40-foot boat could still have comfortable access to every point along the foreshore adjacent to the waterfront property, and to and from deep water with enough room to manoeuvre and turn around.

Providing that these guidelines are followed and that the tenure does not create an interference with the public right of navigation or specially damage the waterfront property owner, consent of the owner should not be required.

## The Right of Access and Tenure Not Involving Improvements

Temporary permits and licences of occupation issued for the foreshore or restricted to nearshore or offshore Crown land should not require the consent of the property owner, if they do not involve improvements that would impede access.

If such tenures do involve improvements, however, even temporary ones, the guidelines given above would apply.

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